

Teoh Eng Huat v Kadhi, Pasir Mas & AnorSUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL
NO 220 OF 1989ABDUL HAMID LP, HASHIM YEOP A SANI CJ (MALAYA),
LEE HUN HOE CJ (BORNEO), GUNN CHIT TUAN AND
JERMURI SERJAN SCJJ
21 APRIL 1990*Family Law — Infant — Right of father and lawful guardian to decide religion, education and upbringing of infant — Age of majority — Purported conversion to Islam — Guardianship of Infants Act 1961 — Federal Constitution, arts 3, 8, 11 & 12**Constitutional Law — Freedom of religion — Religion of infant — Instruction in religion — Federal Constitution, arts 3, 8, 11 & 12*

The appellant discovered that his daughter, who had been missing, had been converted as a Muslim by the first respondent. His daughter was almost 18 years old, and a minor under the civil law. The appellant brought an action in the Kota Bahru High Court seeking a declaration that he, as the lawful father and guardian, has the right to decide the religion, education and upbringing of his infant daughter. There were also other prayers seeking consequential relief. The High Court dismissed the application of the appellant. [See [1986] 2 MLJ 228.] The appellant appealed to the Supreme Court. In the meantime, the girl had reached the age of majority.

Held, allowing the appeal:

(1) Under normal circumstances, a non-Muslim parent or guardian has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority, which is 18 years under the civil law.

(2) In the wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any religion other than his own without the permission of the parent or guardian.

(3) As the law applicable to the infant at the time of the conversion was the civil law, the right of religious practice of the infant should therefore be exercised by the guardian on her behalf until she attains the age of majority. A person under the age of 18 does not have that right and in the case of non-Muslims, the parent or guardian normally has the choice of the minor's religion.

(4) Although the appeal is allowed, no declaration was made, as the daughter was no longer an infant.

[Perayu didalam kes ini adalah seorang Buddhist dan anak perempuannya yang hampir umur 18 tahun dan yang belum dewasa mengikut undang-undang sivil, telah didapati hilang. Perayu dapat tahu bahawa anaknya itu telah diterima masuk Islam oleh responden pertama. Perayu telah membawa kes di Mahkamah Tinggi, Kota Bahru memohon deklarasi bahawa ia sebagai bapa dan penjaga yang sah mempunyai hak menentukan agama, pelajaran dan pendidikan anak perempuannya yang belum dewasa itu. Ia juga membuat permohonan lain untuk relif bersampingan. Mahkamah Tinggi telah menolak permohonannya — lihat [1986] 2 MLJ 228. Perayu telah merayu ke Mahkamah Agong. Dalam pada itu, budak perempuan itu telah mencapai umur dewasa.

Diputuskan, membenarkan rayuan itu:

(1) Didalam keadaan biasa, seorang ibubapa atau penjaga bukan Islam berhak menentukan pilihan beberapa perkara

A mengenai kehidupan anak yang belum dewasa hingga ia mencapai umur dewasa, yang mana ialah 18 tahun di bawah undang-undang sivil.

(2) Demi kepentingan yang luas negara, tidaklah seorang anak belum dewasa mempunyai hak mendapat pengajaran mengenai apa-apa agama selain dari agamanya tanpa izin ibubapa atau penjaganya.

B (3) Oleh kerana undang-undang yang dikenakan pada masa ia masuk Islam itu ialah undang-undang sivil, hak amalan keagamaan anak yang belum dewasa itu hendaklah ditentukan bagi pihaknya oleh penjaganya hingga ia menjadi dewasa. Seorang di bawah umur 18 tahun tidak mempunyai hak itu dan bagi orang-orang bukan Islam ibubapa atau penjaga biasanya mempunyai hak memilih agama anak yang belum dewasa itu.

C (4) Sungguhpun rayuan dibenarkan, tidak apa-apa deklarasi dibuat, oleh kerana anak itu telah pun dewasa.]

Legislation referred to

Guardianship of Infants Act 1961

Federal Constitution arts 3, 8, 11, 12

D Constitution of India art 28(3)(2)

Gooi Hock Seng (N Shanmugam and M Athimulam with him) for the appellant.

Md Raus bin Sharif (Legal Advisor, Kelantan) for the first respondent

Nik Saghir bin Mohd Noor for the second respondent.

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*Cur Adv Vult***Abdul Hamid LP** (delivering the judgment of the court):

This is an appeal from the judgment of the High Court, Kota Bahru. We heard the appeal on 2 March 1990 and gave a short oral judgment. We indicated that in view of the importance of this case we would give a written judgment. We do so now.

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We have studied minutely the appeal records and given full weight to the various views expressed by the trial judge and the counsel before us. However, many of the issues dealt with by the learned judge were not quite relevant for the decision of this appeal. In our grounds of judgment, we shall only place emphasis to those matters in respect of which we think some explanation would be helpful for future cases.

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The facts of the case according to the affidavits filed and submission made by counsel are quite simple in our view. The plaintiff is a Buddhist and his daughter Susie Teoh Bee Kue (referred to as 'the infant'), born on 5 April 1968 and nearing the age of 18 years, a minor by secular law, was found missing on 18 April 1985. The discovery of her absence was made by her boyfriend, Tan Boon Hwee. After futile searches for a week, the plaintiff's son-in-law then made a police report. Later it was reported that she was converted on 22 December 1985 as a Muslim by the Kadhi of Pasir Mas, Kelantan. There is no evidence at all that the plaintiff's daughter was persuaded by any responsible person or authority in any manner to purportedly change her religion. In fact, it would appear that at the material time, the plaintiff's daughter had two boyfriends,

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one known and approved by the father and the other unknown to the father with whom apparently she disappeared, leaving no clue about her whereabouts, when the hearing took place.

The original action was filed in the Kota Bahru High Court seeking a declaration that the plaintiff, as the lawful father and guardian, has the right to decide her religion, education and upbringing. There were also other prayers seeking consequential relief. The application of the plaintiff was dismissed with costs. The girl has now reached the majority of age and therefore the appeal in so far as this case is concerned is purely of academic interest.

We have carefully studied the grounds of judgment by the learned judge who made a thorough analysis of law and facts but in our considered opinion, the trial judge was wrong in both law and facts. It is to be observed that the learned judge did not avail himself of the opportunity to interview the infant girl but formed certain inferences to the prejudice of the plaintiff, the father of Susie, based on possibilities of the situation. For the purpose of our decision, we need not elaborate more except to say that no religious authority, be it the first defendant or second defendant, was in any way to blame or to be held responsible for the course of events. The first defendant who purportedly converted Susie did so in good faith as he had no reason to doubt whatsoever the story she told about her legal and factual status and affairs of life. What we are more concerned is the judge's purported elucidation of our constitutional law, especially relating to religion and the rights and powers of a parent of a non-Muslim child under the Guardianship of Infants Act 1961. While we cannot say that his contents are totally devoid of merit, we feel that his analysis and interpretation, rooted on wrong premises, are not in accordance with the spirit and intention behind the respective legislation, in particular in his attempts to maintain that the infant in this case, the plaintiff's daughter aged 17 years and eight months at the material time, was a person who could decide for herself her religious training and religion in the exercise of her constitutional right. He bases his contention on cl (1) and (4) of art 11 of our Constitution which reads 'Every person has the right to profess and practise his religion and, subject to clause (4), to propagate it.' The trial judge's conclusion is that the expression 'every person' means all those who are of sound mind and are in position to decide. In support of his contention, he quotes art 12 of the Constitution which reads:

(1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth

(a) in the administration of any educational institution maintained by a public authority, and, in particular, the admission of pupils or students or the payment of fees; or

(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

(2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instruction in the religion of Islam and incur such expenditure as may be necessary for the purpose.

(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

The trial judge summarizes in his judgment that the word 'requires' in cl (3) of s 12 means some form of coercive element and that cl (3) is not applicable when one does the prohibited acts voluntarily. After saying so, he seeks support for his contention from sub-cl (4). In his opinion, the words in sub-cl (4) 'for the purpose of cl (3)' can only apply to that specific clause alone and not generally. The cumulative practical effect of the judge's interpretation is that any non-Muslim infant under the age of 18 can decide his own religion, notwithstanding the wishes of the guardian or parent.

In fairness to the trial judge, we have given considerable thought to the relevant constitutional provisions, the provisions of the Guardianship of Infants Act 1961 and the circumstances behind the promulgation of our Constitution. Although normally, in accordance with usual judicial practice, we base our interpretative function on the printed letters of the legislation alone, in the instant case, we took liberty, as Lord Denning is reported to have done, to ascertain for ourselves what purpose the founding fathers of our Constitution had in mind when our constitutional laws were drafted. The Malaysian Constitution was not the product of overnight thought but the brainchild of constitutional and administrative experts from UK, Australia, India and West Pakistan, known commonly as the Reid Commission following the name of the Rt Hon Lord Reid, LL.D, FRSE, a Lord of Appeal in the Ordinary. Prior to the finding of the Commission, there were negotiations, discussions and consensus between the British government, the Malay Rulers and the Alliance party representing various racial and religious groups. On religion the Commission submitted:

169 We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion. There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-

Muslims. In the memorandum submitted by the Alliance it was stated:

'the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religions and shall not imply the State is not a secular State.' There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that counsel for the Rulers said to us 'it is Their Highnesses' considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim faith or Islamic faith be the established religion of the Federation. Their Highnesses are not in favour of such a declaration being inserted...'

It was on the above basis that our Constitution was drafted and promulgated.

We are also mindful of art 3 of the Constitution which says that Islam is the religion of the Federation; but other religions shall be practised in peace and harmony in any part of the Federation.

An affirmation of art 3 of the Constitution was specifically stated in para 15 of the Malaysian Report of the Inter-Governmental Committee 1962. There was a similar affirmation of art 11 of the Constitution (at para 15(2)).

Stripped of technical hairsplitting or purely academic arguments, it is our view that under normal circumstances, a parent or guardian (non-Muslim) has the right to decide the choice of various issues affecting an infant's life until he reaches the age of majority. Our view is fortified by the provisions of the Guardianship of Infants Act 1961, which incorporates the rights, liabilities of infants and regulate the relationship between infants and parents. We do not find favour with the learned judge's view that the rights relating to religion is not covered by the Act on the ground that the word 'religion' is not clearly spelt out in the law. In our view, religious practice is one of the rights of the infant, exercised by the guardian on his behalf until he becomes major. In India, art 28(3)2 of the Indian Constitution states:

No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

This section makes it incumbent to obtain the consent of the guardians.

In all the circumstances, we are of the view that in the wider interests of the nation, no infant shall have the automatic right to receive instruction relating to any

other religion than his own without the permission of the parent or guardian.

Reverting to the issue before this court, the crucial question remains whether the subject, an infant at the time of conversion, had legal capacity according to law applicable to her. It is our considered view that the law applicable to her immediately prior to her conversion is the civil law. We do not agree with the learned judge's decision that the subject although below 18 had capacity to choose her own religion. As the law applicable to the infant at the time of conversion is the civil law, the right of religious practice of the infant shall therefore be exercised by the guardian on her behalf until she becomes major. In short, we hold that a person under 18 does not have that right and in the case of non-Muslims, the parent or guardian normally has the choice of the minor's religion.

We would observe that the appellant would have been entitled to the declaration he had asked for. However, we decline to make such declaration as the subject is no longer an infant. The appeal is allowed with no order as to costs.

Appeal allowed.

Solicitors: *Shan Gooi & Huang; Nik Saghir, Yaacob & Ismail.*

Reported by *Prof Ahmad Ibrahim*

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